BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SARAH ANN WEDAN Claimant	)	
VS.	)	
SOUTH CENTRAL MENTAL HEALTH COUNSELING Respondent	)	Docket No. **1,061,720**
AND	)	
COMMERCE & INDUSTRY INS. CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the March 13, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. Joseph Seiwert, of Wichita, Kansas, appeared for claimant. John B. Rathmel, of Merriam, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits, dated October 9, 2012, and all pleadings contained in the administrative file.

The ALJ found that the sexual assault suffered by claimant at the hands of an intruder in respondent's premises resulted from an increased risk associated with claimant's employment. Therefore, the ALJ concluded claimant's personal injury by accident and her need for psychological treatment arose out of and in the course of her employment. The ALJ ordered respondent to provide authorized treatment with the Emily Program and to reinstate claimant's temporary total disability benefits (TTD).

ISSUES

Respondent contends the ALJ erred in finding claimant sustained personal injury by accident arising out of and in the course of her employment. Respondent urges the Board to reverse the ALJ's Order and deny compensation.

Claimant argues the ALJ's Order should be affirmed.

The sole issue raised on review is whether claimant sustained personal injury by accident arising out of and in the course of her employment.

The date of the alleged accidental injury was November 16, 2011, and the claim is accordingly governed by the substantially amended Act (New Act) which became effective on May 15, 2011.[1]

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant was 27-years old when she testified at the October 9, 2012, preliminary hearing. She started working for respondent as a case manager in September 2011. Ms. Wedan worked with whom she referred to as "clients." The clients ranged in age from preschoolers to adolescents. In general, claimant's duties required her to counsel clients in identifying feelings, working on social issues and helping with coping skills. Claimant performed her work both at respondent's office in El Dorado, Kansas, and at the homes of her clients. Claimant was required to drive as part of her duties, both within the city of El Dorado and outside that community. Claimant was required to use her personal vehicle for purposes of business-related travel and respondent reimbursed claimant for miles driven in connection with her duties.

Since a number of claimant's clients were students, claimant at times had to schedule appointments in afternoons or evening. Claimant's job required her to meet with clients 20-25 hours per week and the remaining hours she wrote reports and updated files.

Claimant testified she worked about 40 hours per week and kept track of her working hours on her laptop computer. Claimant did not have set working hours, but she had to work at least 40 hours per week. She was also required to enter into her laptop the notes from each client appointment. Occasionally, to assist a client with specific issues, claimant drove the client to a park, a department store or a social event. Respondent made car seats available to claimant and other case managers to use when children had to be driven somewhere.

On November 16, 2011, claimant had to transport a young child/client, which required use of a car seat. At about 8 p.m., claimant finished with her last client for the day and picked up some carry-out food. Claimant parked in the parking lot of a Wal-Mart, where she ate and entered a few notes in her laptop. While so engaged claimant realized she still had the car seat and it needed to be returned to the office. Claimant testified she had to return the car seat that evening because she did not intend to go to the office the

[1] See K.S.A. 2011 Supp. 44-505(c).

following morning and she wanted to make sure the car seat was available for other case workers.[2]

Claimant decided to finish her notes at the office since she had to drop off the car seat anyway. Claimant parked right in front of respondent's office. The lock on the front door of the office was difficult to open. Claimant testified:

> Q. So you got your key out?
>
> A. Yes.
>
> Q. Was there any kind of problems with the lock there?
>
> A. Yes. I almost always struggled to get into the office, like I had to jiggle my key and just get it in the right place to open it.
>
> Q. So there was some kind of problem with the lock at that point?
>
> A. Yes.
>
> Q. Or at least your key and that lock?
>
> A. Yes.
>
> Q. Had you ever asked about that, whether that needed to be -- could be fixed or changed or anything like that?
>
> A. Yes.
>
> Q. And do you remember who you had talked to about that?
>
> A. I talked to both of my supervisors.
>
> Q. Okay. And what did you tell the supervisors about that lock?
>
> A. Well, I mean they knew that I had had trouble with it from the first day because they both kind of showed me what I had to do to get in; and then everyone was having problems with it.
>
> Q. Okay. So it wasn't just your key, --
>
> A. Right.

[2] Claimant's testimony conflicts regarding whether she ate and then returned to the office, or whether she returned to the office first and ate after the assault occurred. See P.H. Trans. at 29-30, 51-53.

Q. -- it was all the keys?

A. Yes.

Q. Do you know if that was ever repaired?

A. I don't know.

Q. Did you have difficulty with it on the night of November 16th?

A. Yes.[3]

Claimant described the accident as follows:

> I was trying to get in the door and someone came up behind me with a gun. And after a few altercations, he forced me into the building and raped and assaulted me.[4]

Respondent's office was located in a small strip center. Claimant testified the office was located "somewhat downtown."[5] Two other businesses were located in the same strip center. The area outside respondent's office where claimant parked had no light–claimant agreed it was "dark everywhere."[6] The parking lot area of the strip center likewise had no lights.

This assault occurred at approximately 8:45 p.m.[7] in a room where claimant normally worked with children. She did not recall how long she was kept in the building. Insofar as claimant was aware, no one else was in the building when the injury occurred. Claimant said she would not be able to describe the attacker. Claimant felt she would recognize the perpetrator's voice. Claimant did not report the sexual assault until a few days later. Claimant explained:

Q. And why didn't you report it to anyone?

A. I really -- I just wanted to forget about it and move on. I didn't want to make a big deal out of it.

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[3] P.H. Trans. at 15-17.

[4] *Id*. at 17.

[5] *Id*. at 53.

[6] *Id*. at 34.

[7] *Id*., Cl. Ex. 1 at 21; Cl. Ex. 3 at 23.

> Q. Okay. When you tried to go back to work though, were you having some difficulties there?
>
> A. Yes.
>
> Q. What kind of difficulties would you have there?
>
> A. I would re-live the trauma in that office, and I had a very difficult time concentrating on what I was doing with my clients, and really just being present with them.
>
> Q. And did you seek some psychiatric help at that time?
>
> A. Yes, I did.[8]

Due to diagnoses of anorexia nervosa and major depression, claimant received psychological treatment on a weekly basis since 2007. Claimant's therapist at the time of the injury was Dr. Beth McGilley, a licenced clinical psychologist who started treating claimant in 2010. After she was attacked and injured, claimant told Dr. McGilley about the assault. Claimant was diagnosed with post-traumatic stress disorder (PTSD).

Dr. McGilley's progress note dated November 19, 2011, indicates claimant told the doctor "her [respondent's] office had been broken into a few weeks ago and that her parking lot is not lit and the lock on the door is difficult to open and was going to be repaired."[9]

After her accidental injury, claimant was treated for approximately five months at a residential psychiatric facility in Chicago. After completion of the in-patient treatment, claimant was supposed to attend a "step-down" program. The goal of the step-down program was to gradually integrate claimant back into society and a normal life.

In early August 2012, respondent terminated authorized treatment and TTD. Respondent did not provide claimant's step-down treatment.

At the time of the preliminary hearing, claimant was attending an outpatient step-down program, referred to in the record as "the Emily Program," which is administered at a facility in Minneapolis, Minnesota. Claimant was living near family in Minneapolis while attending the Emily Program.

Claimant testified on cross examination that after the assault she threw her clothes into a dumpster outside the building. She then drove home, from McPherson to Newton,

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[8] *Id.* at 18-19.

[9] *Id.*, Cl. Ex. 1 at 21.

Kansas, wearing a sleeping bag that was in her car. Claimant showered multiple times. She came into work the next day (Thursday) and Friday but did not tell anyone about the attack. Claimant saw Dr. McGilley on Saturday, November 19, 2011, and told the doctor about the assault. Dr. McGilley convinced claimant to call the police and notify her employer.

Claimant went to Via Christi St. Joseph Hospital on November 20, 2011, where she was examined. Claimant denied permission for pictures of her to be taken. She did not remember refusing a speculum examination or a medical screening performed by a physician, although the hospital records confirm claimant did refuse the speculum and physician examination. Claimant told hospital personnel, and testified at the preliminary hearing, that she had never engaged in sexual activity prior to the rape.

Claimant was unaware of any reports of assaults or rapes at or near respondent's office during the approximate two-month period she worked for respondent prior to injury. There is no evidence in the record that the vicinity of respondent's office was a high crime area.

With the help of her psychologist, claimant tried to get back to work. For a time, claimant returned to work for respondent in compliance with the limitations imposed by Dr. McGilley. At the request of claimant, respondent transferred her to its Augusta, Kansas office. But, claimant still found it difficult to park in a parking lot and walk into a building.

Claimant described her current symptoms:

> Right now I really struggle with like manners a lot; I still struggle with flashbacks; I have a lot of anxiety, especially going outside and going outside at night is really difficult for me. I still have trouble concentrating.[10]

When the regular hearing occurred, claimant was in the process of moving to Minneapolis.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(a)(b)(c) state:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

[10] *Id*. at 21-22.

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
>
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[11]

K.S.A. 2011 Supp. 44-508(d) provides:

> "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(f) provides in relevant part:

> (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor.

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[11] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

> An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
>
> . . .
>
> (B) An injury by accident shall be deemed to arise out of employment only if:
>
> (I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
>
> (3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:
>
> (I) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
>
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
>
> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2011 Supp. 44-508(g) provides:

> "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

ANALYSIS

The undersigned Board Member agrees with the findings and conclusion set forth in the preliminary hearing Order dated March 13, 2013, and accordingly affirms the Order.

This Board Member finds as follows:

1. The uncontroverted evidence establishes claimant sustained an "accident" as defined in K.S.A. 2011 Supp. 44-508(d). The accident consisted of the brutal sexual assault she suffered on November 16, 2011. Undisputed evidence cannot be disregarded by the

finder of fact and is ordinarily regarded as conclusive, unless such evidence is shown to be improbable, unreasonable or untrustworthy.[12]

2. Claimant's testimony and the medical evidence admitted at the preliminary hearing establish that claimant's accident was the prevailing factor in causing claimant's multiple injuries, her medical condition, and her current disability or impairment. As reflected in the records in claimant's Exhibits 1, 2, and 3, to the preliminary hearing transcript, claimant sustained numerous changes or lesions to the physical structure of her body caused directly by the accident. Claimant's injuries included bruises, swelling and lacerations on her face, right hip, left leg and back. There were multiple indications of torn tissue were consistent with claimant's description of the sexual assault.

3. The records from the clinical psychologist, Dr. McGilley,[13] establish claimant, in addition to the physical injuries, was also injured psychologically as a direct and natural consequence of the personal injuries and physical trauma. Claimant had not been previously diagnosed with PTSD or treated for that disorder.

4. The "arises out of" New Act provisions are inapplicable. There is no issue raised at this point concerning triggering or precipitating factors; aggravations, accelerations, or exacerbations; or injuries rendering a preexisting condition symptomatic.

5. Claimant was at work in the service of respondent when she suffered her accidental injury. Claimant had to drive as a requirement of her job. She had to work into the evening hours because many of her clients were students with whom claimant would meet after school, in the late afternoon and/or in the evening. Respondent paid claimant for work she performed in the evenings and reimbursed her miles driven in connection with business travel. Claimant's accidental injury occurred in the course of her employment.

6. The provisions of the New Act which deal with "arising out of and in the course of employment" are likewise inapplicable to the extent that they concern the natural aging process, activities of day-to-day living, and accidents or injuries arising directly or indirectly from idiopathic causes.

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[12] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[13] Some of Dr. McGilley's records are handwritten and very difficult to decipher. However, a part of the records are typed, which eased the task of understanding the relevant portions of such records.

7. The New Act provisions central to a determination of this claim's compensability are:

A. Whether there is a causal connection between the conditions under which the work is required to be performed and the resulting accident.

B. Whether claimant's accident or injury arose out of a personal or neutral risk, or whether the risk of accident or injury was associated with her employment.

This Board Member finds that the risk of experiencing an assault was associated with her employment. This Board Member finds that there was a causal connection between claimant's work for respondent and the resulting accident. Several factors support that finding:

- Claimant's job for respondent required her to travel by car and it was not unusual for claimant to work into the evening hours.

- Respondent was aware claimant worked into the evening. Claimant was paid for hours she worked in the evening and was reimbursed for mileage, including miles driven in the evening hours.

- Claimant was provided a key to the office thus allowing claimant access to the office at any time.

- The lock to the office had not been working properly since claimant commenced employment for respondent in September 2011. As a consequence, it was difficult to unlock the front door. Other employees of respondent experienced problems unlocking the front door. Insofar as claimant was aware, no steps had been taken to have the lock repaired or replaced.

- Respondent's office in McPherson had been broken into a few weeks before claimant's accidental injury.

- There were no lights either immediately outside respondent's office, nor in the parking area of the small strip center where respondent's office was located. There was no indication in the record that any steps had been taken to remedy the complete absence of lighting in the parking lot.

- Claimant's testified she agreed with the notion that when she returned to respondent's place of business at about 8:45 p.m. on November 16, 2011, it was dark everywhere, as one would expect at 8:45 p.m. on a Kansas evening in mid-November.

- Claimant's return to the office on the evening of November 16, 2011, was exclusively related to her work for respondent. Claimant felt she needed to return the car seat to respondent's office because claimant did not plan to go to the office first thing the following morning and she wanted the car seat to be available to other case workers. Also, claimant intended to update some files on her laptop since she had to return to the office anyway.

There was a causal connection between the conditions under which claimant was required to perform her job for respondent and the resulting accident. Claimant's accident and injury arose out of a risk that was neither personal nor neutral but rather was a risk associated with, and increased by, claimant's employment.

CONCLUSION

This Board Member finds that the preponderance of the credible evidence supports the ALJ's decision that claimant sustained personal injury by accident arising out of and in the course her employment with respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[15]

WHEREFORE, the undersigned Board Member finds that the March 13, 2013, preliminary hearing Order entered by ALJ Nelsonna Potts Barnes is affirmed in all respects.

IT IS SO ORDERED.

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[14] K.S.A. 44-534a.

[15] K.S.A. 2011 Supp. 44-555c(k).

Dated this _____ day of June, 2013.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
jjseiwert@sbcglobal.net; nzager@sbcglobal.net

John B. Rathmel, Attorney for Respondent and its Insurance Carrier
jrathmel@jbrlawoffice.com; mbirk@jbrlawoffice.com

Nelsonna Potts Barnes, ALJ